

STATE OF MICHIGAN  
MACOMB COUNTY CIRCUIT COURT

JASON McGUIRE,

Plaintiff,

vs.

Case No. 2006-0541-CH

COUNTRYWIDE HOME LOANS,  
TREASURY BANK, N.A., and  
TROTT & TROTT, P.C.,

Defendants.

OPINION AND ORDER

Defendant Trott & Trott, P.C., has filed a motion for summary disposition, and defendants Countrywide Home Loans and Treasury Bank, N.A., have filed a separate motion for summary disposition.

Plaintiff, in pro per, filed this complaint on February 3, 2006, and filed an amended complaint on June 16, 2006. The amended complaint is almost entirely devoid of factual allegations.<sup>1</sup> Plaintiff asserts that an unnamed mortgage company “was involved in various elements of misrepresentation, entrapment, nondisclosure and . . . fraud,” but he does not allege any facts supporting these conclusions. He claims that Amy Neuman, an attorney for defendant Trott & Trott, was aware of this alleged fraud. He claims that defendants have been unable to validate his alleged debt, have attempted to “injure or ruin” his credit rating, and have attempted

<sup>1</sup> Based on the motions for summary disposition brought by Trott & Trott, Countrywide and Treasury Bank, it appears that the parties’ underlying dispute concerns defendants’ attempts to foreclose on a mortgage on real property formerly owned by plaintiff. Plaintiff apparently disputes the validity of Countrywide and Treasury’s interest in this property and the propriety of their attempts to foreclose.



to “coerce payment.” He claims that an unspecified “lender” failed to provide a good faith estimate in violation of 15 USC §1637a(a)(4)(A). He avers that the unspecified lender failed to provide that he “was given a brochure prepared by the Federal Reserve Board describing HELC plans, or a suitable substitute,” contrary to 15 USC §1637a(e). Plaintiff claims that the mortgage contract at issue provides that the note holder has an interest in the property at issue, but that defendants have been unable to produce anything but a copy of the note. Plaintiff also poses a number of questions to defendants in his amended complaint. Ultimately, plaintiff appears to bring claims for fraud, for violations of the Fair Debt Collection Practices Act, for violations of the Truth in Lending Act, and for unfair and deceptive trade practices.

Trott & Trott’s motion for summary disposition has been brought pursuant to MCR 2.116(C)(8) and (C)(10). Defendants Countrywide and Treasury Bank have brought their motion for summary disposition under MCR 2.116(C)(8) alone. While Countrywide and Treasury Bank do not mention MCR 2.116(C)(7) in their motion, the Court believes that a portion of their motion is properly reviewed under this subrule. The fact that they do not raise MCR 2.116(C)(7) is inapposite, since failure to label a motion as a motion for summary disposition, or to cite the appropriate court rule, does not preclude the Court from reviewing the motion under the correct court rule. See, e.g., *De Caminada v Coopers & Lybrand*, 232 Mich App 494, 495, n 1; 591 NW2d 364 (1998). Summary disposition of all or part of a claim or defense may be granted pursuant to MCR 2.116(C)(7) when the claim is barred because it was filed beyond the period set forth in the applicable statute of limitations. *Vandenberg v Vandenberg*, 253 Mich App 658, 660; 660 NW2d 341 (2002).

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party “has failed to state a claim on which relief can be granted.” *Radtko v Everett*,

442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

#### *Trott & Trott's Motion for Summary Disposition*

The Court shall first address Trott & Trott's motion for summary disposition. In support of this motion, Trott & Trott argues that the underlying dispute in this case concerns a mortgage contract to which it is not a party. Trott & Trott avers that it has been erroneously named as a defendant in this matter based on its legal representation of Countrywide in the foreclosure proceedings. Trott & Trott argues that plaintiff's complaint contains no allegations upon which it could be held liable to him. Trott & Trott notes that plaintiff's claims seeking "validation of the debt" are baseless, and attaches a copy of the adjustable rate note to its motion.

The document that plaintiff has filed entitled "answers to defendant[']s motion for summary disposition judgement" is unresponsive to the motion filed by Trott & Trott. Rather than replying to Trott & Trott's motion, plaintiff raises new arguments and factual allegations.

First, plaintiff claims that the Secretary of Housing and Urban Development must authorize any foreclosure, and notes that Trott & Trott has not provided any documentation from the Secretary of HUD authorizing the foreclosure at issue. Plaintiff also suggests that Trott & Trott is liable for failing to verify his debt as requested. Finally, plaintiff appears to argue that Trott & Trott is liable for proceeding with the foreclosure sale of his property, allegedly in contravention of this Court's order.

The Court agrees with Trott & Trott's contention that the amended complaint contains no allegations upon which Trott & Trott could be held liable to plaintiff. The only factual allegation in plaintiff's amended complaint which could apply to Trott & Trott is that Amy Neuman, an attorney for Trott & Trott, "knows of th[e] fraud" allegedly being perpetrated by the other defendants. However, the circumstances constituting fraud must be pled with particularity. MCR 2.112(B)(1). In order to maintain an action for fraud, plaintiff must plead that there was (1) a material representation made by defendant to plaintiff, (2) the representation was false, (3) defendant knew or should have known of the falsity at the time of making the representation, (4) defendant intended for plaintiff to act upon the representation, (5) plaintiff did act on the representation, and (6) plaintiff suffered injury as a result. *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005). In the case at bar, plaintiff has failed to plead any circumstances constituting fraud, and there is no basis for finding that Trott & Trott are somehow liable for complicity in fraud. Therefore, plaintiff's claims against defendant Trott & Trott must be dismissed pursuant to MCR 2.116(C)(8).

Defendant Trott & Trott also requests an award of attorney fees in this matter under MCR 2.114(F). Whether a claim is frivolous depends on the facts of each case, and must be determined on the basis of the circumstances existing at the time the claim was asserted. *In re*

*Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A plaintiff's inability to defeat a motion for summary disposition does not itself merit a finding that his claims were frivolous. See *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003). Moreover, not every error in legal analysis constitutes a frivolous position warranting the imposition of sanctions. *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). A trial court's determination whether a claim or defense is frivolous is reviewed for clear error. *Id.* at 661. In the present case, while plaintiff's lawsuit against Trott & Trott is properly dismissed, the Court is not convinced that the suit was necessarily frivolous. As such, the Court finds that plaintiff's inability to defeat this motion for summary disposition does not entitle Trott & Trott to sanctions.

*Countrywide and Treasury Bank's Motion for Summary Disposition*

The Court now turns to Countrywide and Treasury Bank's motion for summary disposition. In support of their motion, Countrywide and Treasury Bank aver that plaintiff's complaint contains no factual allegations against them. Second, they argue that plaintiff's claim for fraud or misrepresentation should be dismissed since plaintiff has not pled the elements of fraud with sufficient particularity. Third, they argue that plaintiff's claims for violations of the Truth in Lending Act must be dismissed as a matter of law. Specifically, they aver that the Truth in Lending Act sections cited by plaintiff are applicable only to open end consumer credit plans, that plaintiff specifically denies executing any of the documents in question, and that plaintiff's claims under the Truth in Lending Act are time barred. Next, Countrywide and Treasury Bank argue that plaintiff's claim for unfair or deceptive trade practices is incomprehensible and baseless. Lastly, they urge that plaintiff's amended complaint does not comply with the Michigan Court Rules.

In reply, plaintiff has filed a document that is nearly identical to his response to Trott & Trott's motion for summary disposition.

As a preliminary matter, Countrywide and Treasury Bank do not specifically respond to plaintiff's contention that they have failed to validate his debt. Upon careful review of the amended complaint, the Court is unable to determine whether plaintiff actually intended to bring a separate count for failure to verify his debt. However, there is no dispute that, upon his request that the debt be verified, plaintiff was provided with copies of the documents evidencing his debt obligation. Plaintiff's sole basis for claiming that the debt has not been verified is his contention that Countrywide and Treasury Bank should have provided him with the original documents rather than copies thereof. Plaintiff's position in this regard is without merit. Therefore, the Court is satisfied that plaintiff cannot sustain an action against Countrywide and Treasury Bank for failure to validate his debt.

Next, the Court has carefully reviewed the amended complaint, and finds that plaintiff has not made any factual allegations specifically against Countrywide or Treasury Bank. Apart from the caption, the complaint contains a single reference to Countrywide, indicating that the allonge to the mortgage note "states [']pay to Countrywide.[']" There is no reference to Treasury Bank in the complaint. While plaintiff does make allegations against an unnamed "mortgage company" in his complaint, these allegations are conclusory. The only factual allegations contained in plaintiff's complaint are that (1) an unnamed "lender" failed to provide him with a good faith estimate, (2) an unnamed lender failed to provide him with a brochure describing HELC plans,<sup>2</sup> and (3) an unnamed defendant has a copy of the note, but does not have

---

<sup>2</sup> Plaintiff provides no information regarding "HELC plans." However, 15 USC §1637a(e) requires that homeowners be given a pamphlet conforming to section 4 of the Home Equity Consumer Protection Act of 1988. According to section 4 this act, such pamphlets must contain:

the actual note. These factual allegations are insufficient to state a claim against either Countrywide or Treasury Bank, and plaintiff's complaint should be dismissed pursuant to MCR 2.116(C)(8).

Despite the fact that summary disposition is warranted because of plaintiff's failure to make specific allegations against defendants Countrywide and Treasury Bank, the Court shall briefly address the substance of the apparent counts of plaintiff's complaint. As noted above, plaintiff has failed to allege any factual circumstances constituting fraud. Having failed to plead fraud with specificity, plaintiff's claims for fraud as to Countrywide and Treasury Bank must be dismissed pursuant to MCR 2.116(C)(8). Plaintiff also mentions misrepresentation, entrapment and nondisclosure in connection with his fraud claim. However, plaintiff has made no factual allegations supporting his suggestion that defendants are liable to him on these bases. Therefore, summary disposition of these claims is also warranted under MCR 2.116(C)(8).

Plaintiff's claims under the Truth in Lending Act are likewise unavailing. Plaintiff cites 15 USC §§1637a(a)(4)(A) and 1637a(e) in support of these claims. However, these statutory subsections apply only to open end consumer credit plans secured by the consumer's principal dwelling. See generally 15 USC §1637a. Plaintiff never alleges that the mortgage at issue in this matter secured an open end consumer credit plan, nor does plaintiff allege that the real property at issue was his principal dwelling. Therefore, plaintiff's claims under the Truth in Lending Act are properly dismissed under MCR 2.116(C)(8).<sup>3</sup>

---

(1) a general description of open end consumer credit plans secured by the consumer's principal dwelling and the terms and conditions under which such loans are generally extended; and

(2) a discussion of the potential advantages and disadvantages of such plans, including how to compare among home equity plans and between home equity and closed end credit plans.

<sup>3</sup> Plaintiff's claims under the Truth in Lending Act could also be dismissed pursuant to MCR 2.116(C)(7). Claims under the Truth in Lending Act must be brought within one year from the date of the occurrence of the violation. 15 USC 1640(e). Countrywide and Treasury Bank assert that plaintiff's loan closed on July 20, 2004, and this assertion

The final apparent count in plaintiff's complaint refers to "unfair deceptive trade practices." "Unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce," as enumerated in MCL 445.903(1), are unlawful. However, plaintiff's amended complaint does not allege any facts constituting unfair deceptive trade practices. Therefore, this count must also be dismissed pursuant to MCR 2.116(C)(8).

Lastly, the Court notes that plaintiff's pleadings do not conform to the Michigan Court Rules. See MCR 2.111(A) and MCR 2.113(E). However, having determined that summary disposition of plaintiff's counts as to Countrywide and Treasury Bank is warranted for the aforementioned reasons, the Court need not determine whether plaintiff's case should be dismissed based on the failure of his pleadings to conform to the Michigan Court Rules.

For the reasons set forth above, Trott & Trott's motion for summary disposition is GRANTED, but Trott & Trott's request for sanctions is DENIED. Countrywide and Treasury Bank's motion for summary disposition is GRANTED. Plaintiff's case as to all defendants is DISMISSED with prejudice. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Judge

**DIANE M. DRUZINSKI**  
**CIRCUIT JUDGE**

Date:

**AUG 28 2006**

DMD/

cc: Jason A. McGuire, In Pro Per  
Brian Summerfield, Attorney at Law

**AUG 28 2006**

**A TRUE COPY**  
**CARMELLA SABAUGH, COUNTY CLERK**  
BY: **AB** Court Clerk

is uncontroverted by plaintiff. Since plaintiff filed the present action on February 3, 2006, his counts for violations of the Truth in Lending Act are barred by the statute of limitations.